No. 93-1814

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TANIA FLORES DE BRENES, Individually and as Executor, Administrator, or Personal Representative of the Estate of Eric Antonio Brenes, decedent; and CLAUDIA CROW, individually and as Executor, Administrator, or Personal Representative of the Estate of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, decedents,

Petitioners,

—v.—

TRANSPORTES AEREOS NACIONALES, S.A., a foreign corporation, and SERVICIO AEREO DE HONDURAS, S.A., a foreign corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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SERVICIO AEREO DE HONDURAS, S.A.

QUESTION PRESENTED

Whether the Court lacks jurisdiction under 28 U.S.C. § 1257 to review a decision of a state's intermediate appellate court interpreting the law of a foreign country as it applies to a state claim when petitioners' purported federal claims were not raised in the state court in the manner required by state law and were not decided by the court below.

RULE 29.1 STATEMENT

The respondents, TRANSPORTES AEREOS NACIONALES, S.A. and SERVICIO AEREO DE HONDURAS, S.A., have no parent companies or subsidiaries.

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STATUTES AND RELEVANT PROVISIONS

The relevant statutes and other provisions of Nicaraguan law are reprinted in the Appendix hereto at App. 1a-4a.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1814

TANIA FLORES DE BRENES, Individually and as Executor, Administrator, or Personal Representative of the Estate of Eric Antonio Brenes, decedent; and CLAUDIA CROW, individually and as Executor, Administrator, or Personal Representative of the Estate of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, decedents,

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ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents TRANSPORTES AEREOS NACIONALES, S.A. ("TAN") and SERVICIO AEREO DE HONDURAS, S.A. ("SAHSA") (collectively referred to herein as "TAN-SAHSA") respectfully request that the Court deny the petition for writ of certiorari seeking review of the decision of the Third District Court of Appeal of Florida that moral damages are not recoverable in these cases under Nicaraguan wrongful death damage law. The decision below is reported at 625

So.2d 4 (Fla. Dist. Ct. App. 1993) and is reprinted in the Appendix to the Petition.[1]

STATEMENT OF JURISDICTION

These cases involve a state court's interpretation of the wrongful death damage law of Nicaragua which did not draw into question the validity of a treaty or statute of the United States on federal constitutional grounds. Thus, this Court would have jurisdiction to review the decision of Florida's Third District Court of Appeal under 28 U.S.C. § 1257(a) only if petitioners "specially set up or claimed" a "title, right, privilege, or immunity . . . under the Constitution . . . of . . . the United States." The decision of the Third District Court of Appeal did not involve a federal right, title, privilege or immunity. Petitioners failed to raise any federal constitutional claim in the time and manner required by Florida law and the court below did not decide the case on any federal ground. Accordingly, this Court does not have jurisdiction and the petition should be denied.

A. Petitioners Failed To Raise the Federal Due Process Claim in the Trial Court

Under 28 U.S.C. § 1257(a), federal claims must be "adequately presented" in the state courts in the time and manner required by state law. *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). If the state procedures for asserting federal claims are not followed, this Court lacks jurisdiction. *See, e.g., Pennsylvania R.R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-63 (1936) (Court was "without jurisdiction" because federal constitutional claim was not raised in state trial court as required by state law); *Central Union Tel. Co. v. City of Edwardsville*,

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[1] References to the Petition appear as "Pet. ___"; references to the Appendix to the Petition appear as "Pet. A - ___". References to the Appendix hereto appear as "App. ___".

269 U.S. 190, 194-95 (1925) (plaintiff in error "waived" federal claims by not following state procedures governing assertion of such claims).

Petitioners concede that they failed to raise any federal constitutional claims in the trial court and did not assert a due process claim until they moved for rehearing in the Third District Court of Appeal. *See* Pet. at 7. Petitioners' untimely assertion of a federal due process claim constituted a waiver of that claim under Florida law, which mandates that constitutional claims must first be raised in the trial court. *See, e.g., Penn v. Florida Defense Fin. and Accounting Serv. Ctr. Auth.*, 623 So.2d 459, 462 (Fla. 1993) (claim that Florida statute violated Fifth and Fourteenth Amendments was "procedurally barred for [appellant's] failure to raise it below [in the trial court]"); *Fleischer v. Fleischer*, 586 So.2d 1253, 1254 (Fla. Dist. Ct. App. 1991) ("Constitutional issues, like any other, are waived unless they are first presented in the trial court. The only exception to the raise-it-or-waive-it rule is for fundamental error.").[2] *See also Sag Harbour Marine, Inc. v. Fickett*, 484 So.2d 1250, 1256 (Fla. Dist. Ct. App. 1986) (on motion for rehearing) ("[A] party cannot present arguments in a motion for rehearing that have not been presented to the court in the appellate briefs or oral argument."). Accordingly, petitioners' failure to raise their purported due process claim in the trial court in the manner required by Florida law deprives this Court of jurisdiction to review that claim.

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[2] Petitioners' due process claim, which is based on a state appellate court's purported misinterpretation of foreign law, does not fall within the fundamental error rule. " 'Fundamental error' . . . refers to error that goes to the very heart of the judicial process, not to mistakes as to which arguably correct law to apply, or as to the application of such a rule of law to the facts in the case." *Fleischer*, 586 So.2d at 1254.

B. Petitioners Never Asserted a Violation of the Act of State Doctrine in the Court Below

Petitioners also seek to have this Court review whether the Third District Court of Appeal's interpretation of Nicaraguan law violated the act of state doctrine even though petitioners grudgingly acknowledge that they failed to raise that issue at any stage of the proceedings in the Florida courts. *See* Pet. at 24 ("the [act of state] doctrine was not explicitly invoked by its technical appellation below").

Petitioners' argument that their act of state claim was "implicitly" encompassed within their "comity" argument, *see* Pet. at 24-25, misses the mark. First, the act of state doctrine is no longer viewed as an expression of comity; rather, it is described "as a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990). Second, petitioners admittedly never invoked the act of state doctrine below; they merely relied on Florida's rule of comity. *See* Pet. A - 49a-51a. Petitioners may not now contend that their state law comity claim below included a federal act of state claim which they never mentioned. *See Webb*, 451 U.S. at 496-98 (petitioners' use of phrase "full faith and credit," without more, in the state courts did not constitute invocation of federal full faith and credit clause).

This Court has "consistently refused" to address a federal issue "raised here for the first time on review of state court decisions." *Webb*, 451 U.S. at 499. As with petitioners' purported due process claim, this Court lacks jurisdiction to review the act of state claim because it was never presented or decided in the Florida courts.

STATEMENT OF THE CASE

This Petition involves two consolidated wrongful death actions brought in Florida state court by representatives of Nicaraguan citizens killed in the crash of a Honduran airliner near Tegucigalpa, Honduras on October 21, 1989. Petitioners filed suit in Florida state court against TAN-SAHSA even though the airline was subject to jurisdiction in Nicaragua and petitioners could have brought their actions in a Nicaraguan court. TAN-SAHSA agreed not to contest liability for compensatory damages and the parties stipulated that Nicaraguan damage law would apply to these wrongful death claims on behalf of these Nicaraguan citizens. The parties also agreed to litigate the legal issue of whether non-pecuniary "moral damages" were permitted under Nicaraguan law as applied to the undisputed facts.[3]

After an evidentiary hearing, the trial court held, without opinion, that moral damages were recoverable under Nicaraguan law. Florida's Third District Court of Appeal reversed the findings of the trial court as a matter of law and ruled that petitioners were not entitled to recover moral damages under Nicaraguan law for non-economic harm such as grief and mental anguish of the surviving heirs. Now, after the Third District Court of Appeal has ruled against them on what type of wrongful death damages may properly be recovered under Nicaraguan law and the Florida Supreme Court has declined review, petitioners wish to make a "federal case" out of the litigation.

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[3] All plaintiffs in the Florida proceedings were paid their full pecuniary damages by way of settlement or judgment. The total amount paid as pecuniary damages to petitioners and the other Nicaraguan plaintiffs involved was $8.4 million. Petitioner Tania Flores de Brenes was paid $1 million in settlement of her pecuniary loss damages. Petitioner Claudia Crow chose to try her case resulting in a jury verdict of $144,000 in pecuniary damages.

While petitioners seek review of the Florida Third District Court of Appeal's interpretation of the wrongful death damage law of Nicaragua, a civil law jurisdiction, they fail to discuss in their Statement of the Case the Nicaraguan civil law system, preferring instead to piece together snippets of Nicaraguan law and the "opinions" of their expert. Because an understanding of Nicaragua's legal system is necessary to a proper understanding of petitioners' purported federal claims,[4] respondents will provide an overview of Nicaraguan law on this issue and explain why the Nicaraguan Supreme Court's advisory opinion and the *post hoc* Law No. 157 recently enacted by the Nicaraguan National Assembly do not provide a basis for review by this Court.

A. Nicaragua is a Civil Law Jurisdiction Where Legislation Is the Only Source of Substantive Law

Nicaragua is a civil law jurisdiction. A basic feature of civil law systems is that the legislature has a monopoly on making law. Pet. A - 4a; R. Wilson, *Criminal Justice in Revolutionary Nicaragua*, 23 Miami Inter-American L. Rev. 269, 281-82 (1992). All rights, duties, and obligations must be expressly set forth in legislation. *See* Art. 1835, Civil Code of Nigaragua ("The obligations derived from the law are not presumed. Claims can only be based on those obligations expressly provided for in this Code or in the special laws[.]"). App. 3a. A corollary to this principle of legislative supremacy is that civil law courts cannot "make" or "create" law or expand obligations or rights created by legislation. Wilson, *Nicaragua*, 23 Miami Inter-American L. Rev. at 282; J.H. Merryman & D. Clark, *Comparative Law* 496 (1978). Judicial decisions are not a source of substantive law and the common law concept of *stare decisis* is not followed.

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[4] "A mere translation of a foreign statute, without more, without the background, without the context or the area of internal application, is insufficient." *Application of Chase Manhattan Bank*, 191 F. Supp. 206, 209 (S.D.N.Y. 1961), *aff'd*, 297 F.2d 611 (2d Cir. 1962).

See Art. 194, Code of Civil Procedure of Nicaragua. App. 2a.

Article 138(2) of the Nicaraguan Constitution of 1987 further limits the power of the judiciary and vests in the Nicaraguan National Assembly the power to "officially interpret the law." App. 1a. *See* U. S. Dept. of State, "The Sandinista Constitution," published in Ohio University's *The Nicaraguan Constitution of 1987: English Translation and Commentary* 127, 147 (1991) ("the constitution vests the National Assembly—not the courts—with authority to 'officially interpret the law' (Art. 138)").

B. The Nicaraguan Civil and Penal Codes

The preliminary titles of most civil codes contain directions on the interpretation and application of code provisions. The Civil Code of Nicaragua provides that legislation is to be interpreted by examining the language of the code and the intent of the legislators who enacted it. *See* § III, Preliminary Title, "Interpretation of the Law", Civil Code of Nicaragua. App. 2a-3a.

Article 2509 is the basic provision of the Civil Code of Nicaragua dealing with indemnification of damages and losses. Enacted in 1904, Article 2509 provides:

> Everyone who by intentional misconduct, fault, negligence or imprudence or by a malicious act causes injury to another is obligated to repair it along with the harms.

Article 2509 was derived from the Civil Code of Costa Rica. At the time of Article 2509's enactment, Costa Rica did not permit recovery of moral damages. Pet. A - 6a; A. Brenes Córdoba, *Tratado de las Obligaciones* 79 (1977 reprint of 1923 ed.). Because Article 2509 does not provide for the recovery of moral damages, and because the 1904 Nicaraguan National Assembly could not have intended through general language to permit recovery of a form of damages not recognized at the

time, the Third District Court of Appeal correctly ruled that moral damages were not recoverable under the Nicaraguan Civil Code.

In 1974, the Nicaraguan National Assembly amended the Penal Code to permit recovery of moral damages but only upon the criminal conviction of the wrongdoer. *See* Art. 46 and Art. 52, Penal Code of Nicaragua. App. 3a-4a. Significantly, the Nicaraguan National Assembly did not amend the Civil Code to permit the recovery of moral damages. Pet. A - 6a. Because the flight crew on the accident aircraft were acquitted of all criminal charges, petitioners could not recover moral damages under the Penal Code of Nicaragua.

Petitioners contend that two recent developments—the Nicaraguan Supreme Court's "advisory opinion" of October 5, 1992 and Law No. 157 enacted by the National Assembly, coincidentally, on March 23, 1993, the last day for the filing of petitioners' motion for rehearing in the Third District Court of Appeal—provide a federal jurisdictional basis for this Court's review and require an award of moral damages in these consolidated actions. Petitioners' arguments have no merit.

C. The Advisory Opinion

On October 5, 1992, after respondents had filed their initial brief in Florida's Third District Court of Appeal, and as a result of the *ex parte* efforts of petitioners' representatives, the Nicaraguan Supreme Court issued an "advisory opinion" which stated that moral damages were recoverable under the Civil and Penal Codes. *See* Pet. A - 129-15a. Petitioners admit that the advisory opinion was obtained *ex parte* through the efforts of "persons sympathetic to [petitioners'] position." Pet. at 6.

As previously noted, *supra* at 6-7, the advisory opinion did not affect the provisions of the Civil and Penal Codes because judicial opinions, particularly advisory opinions, are not a source of substantive law in Nicaragua. *See* App. 2a. For this

reason, the Third District Court of Appeal found it unnecessary to discuss the advisory opinion just as it did not discuss any other Nicaraguan judicial decisions which were brought to its attention by the parties.[5]

D. Law No. 157

On March 23, 1993, in response to the Third District Court of Appeal's decision, and as a result of petitioners' lobbying efforts, the Nicaraguan National Assembly enacted Law No. 157. This new law was to take effect upon its publication, which occurred several days later. *See* Pet. A - 18a.

Law No. 157 changed Nicaraguan law by providing that moral damages can now be recovered under Article 2509 of the Civil Code *and* under the Penal Code because the absence of a criminal conviction is no longer a bar to such damages. *See* Pet. A - 16a-19a. Law No. 157 is new legislation which would alter the substantive rights of the parties. For the first time in the history of Nicaragua, Law No. 157 created a civil remedy for moral damages under Article 2509 of the Civil Code. Petitioners erroneously argue that the new Law No. 157, enacted in 1993, permits them to recover moral damages in these consolidated cases arising out of a 1989 accident.

Contrary to petitioners' suggestions, the Third District Court of Appeal did not rule that Law No. 157 was invalid or illegitimate. The Third District Court of Appeal apparently agreed with respondents that Law No. 157 did not apply because the Nicaraguan Constitution of 1987, the supreme law of Nicaragua, absolutely prohibits the retroactive application of *any* law:

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[5] For example, the Third District Court of Appeal did not cite to the Nicaraguan Supreme Court's decision in *Carazo Olivier v. Texaco Caribbean, Inc.*, April 2, 1968, Corte Suprema de Justicia, Bol. Jud. 56, which held that "there is no cause of action for the claim of moral damages, so it is dismissed." In fact, no judicial decision in the history of Nicaraguan jurisprudence ever has awarded moral damages in a wrongful death case.

> The law does not have retroactive effect, except in criminal matters when it favors the accused.

Art. 38, Constitution of Nicaragua. App. 1a. Not surprisingly, petitioners do not even mention Article 38 of the Nicaraguan Constitution in their Petition.[6]

REASONS FOR DENYING THE WRIT

A. The Court Lacks Jurisdiction

As noted earlier, this Court lacks jurisdiction under 28 U.S.C. § 1257 because petitioners never raised the act of state doctrine in the Florida courts and only raised the federal due process claim in an untimely manner when they moved for rehearing of the decision of the Third District Court of Appeal. Moreover, neither issue ever was decided by the court below.[7] Respondents, however, briefly will address the substance of petitioners' purported federal claims so that this Court will not be left with the mistaken impression that those claims have any merit.

B. The Florida Third District Court of Appeal Did Not Violate the Due Process Clause in its Interpretation of the Wrongful Death Damage Law of Nicaragua

Petitioners cannot properly assert a claim under the Due Process Clause on the basis of *United States v. Pink*, 315 U.S. 203 (1942). *Pink* involved the recognition of a foreign decree because of a treaty of the United States known as the Litvinov Assignment. The federal question at issue in *Pink* derived

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[6] Instead, petitioners seek to equate Law No. 157 to an intervening decision of a Florida court in a case governed by Nicaraguan law. *See* Pet. at 10 n.3. Petitioners' reliance on Florida principles of retroactivity demonstrates how far removed this case is from any federal issues.

[7] When a state court fails to address a federal question, this Court assumes that "the omission was due to want of proper presentation . . . unless the aggrieved party can affirmatively show to the contrary." *Webb*, 451 U.S. at 495.

from the treaty and the *Pink* Court specifically noted that the "claim of the United States based on the Litvinov Assignment raises a federal question." *Pink*, 315 U.S. at 217. The case at bar does not involve a treaty of the United States from which petitioners might derive a federal right.

Petitioners' reliance on *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), for the proposition that a state court's "misconstruction" of the law of a foreign country violates the Due Process Clause, is misplaced. *Wortman* did not involve the interpretation of the law of a foreign country. Instead, *Wortman* analyzed whether a forum state's application of its own statute of limitations to claims governed by the laws of other states and its interpretation of the laws of other states violated the Full Faith and Credit Clause or the Due Process Clause's restrictions on choice of law. *Wortman* does not apply here because this case involves the interpretation of the law of a *foreign* country applied pursuant to stipulation by the parties.

Even if the analysis in *Wortman* could be extended to the interpretation of a foreign country's law,[8] petitioners have not set forth a due process claim. As the Court noted in *Wortman*, a mere misconstruction by the forum state of the laws of a sister state is not a violation of the Full Faith and Credit Clause or the Due Process Clause. *Wortman*, 486 U.S. at 731. *Accord Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 834 (1985) (Stevens, J., concurring).

Moreover, petitioners' contention that the Third District Court of Appeal's interpretation of Nicaraguan law contradicts the Nicaraguan Supreme Court's advisory opinion or Law No. 157 and, therefore, violates petitioners' purported due process rights is erroneous. The Third District merely

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[8] Respondents do not believe that it can. While "Article 4 of the Constitution confers the right to have full faith and credit `given in each state to the public acts, records and judicial proceedings in every other state'. . . [n]o such right, privilege or immunity, however, is conferred by the Constitution . . .in respect to the judgments of foreign states or nations." *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 190 (1912).

recognized that petitioners' reliance on the eleventh hour advisory opinion was misplaced because, under Nicaraguan law, judicial decisions, much less advisory opinions, are not sources of positive law and the common law concept of *stare decisis* is not followed. *See supra* at 6-7.

Finally, Law No. 157 cannot be applied retroactively in these cases. The Nicaraguan Constitution, which is the supreme law of Nicaragua, forbids the retroactive application of *all* laws. *See* Article 38, Constitution of Nicaragua. App. 1a. Thus, Law. No. 157, enacted in 1993, cannot be applied retroactively to enhance damages for claims arising from this 1989 accident.[9]

C. The Florida Third District Court of Appeal Did Not Question the Validity of Any Acts of the Nicaraguan Government and, Therefore, Did Not Violate the Act of State Doctrine in its Interpretation of the Wrongful Death Damage Law of Nicaragua

Petitioners erroneously contend that the Third District Court of Appeal violated the act of state doctrine by ruling that they could not recover moral damages. As the Court recently explained in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990), the act of state doctrine applies only where "the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory."

The factual predicate for the act of state doctrine is missing here because nothing in the litigation required the Florida

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[9] Indeed, retroactive application of Law No. 157 would have violated respondents' due process rights under Florida Supreme Court precedent. *See, e.g., Florida Patient's Compensation Fund v. Scherer*, 558 So.2d 411, 414 (Fla. 1990) ("[D]amages and penalties . . . for which [a party] may be held liable cannot be constitutionally enlarged after the date of the alleged [wrongful act]."). This Court recently addressed the constitutional problems posed by retroactive application of legislation. *See Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1497-1501 (1994).

courts to pass upon the validity of any acts of the Nicaraguan government. In this case, the Third District Court of Appeal simply interpreted the law of Nicaragua as it applied to petitioners' state claims. Respondents never argued below that the post-accident, post-appeal advisory opinion of the Nicaraguan Supreme Court or Law No. 157 were invalid, although both were admittedly obtained as a result of petitioners' lobbying efforts, and the Third District Court of Appeal did not in any way hold that these acts were not the valid and legitimate acts of a foreign sovereign. As explained above, *see supra* at 8-10, the express provisions of the Nicaraguan Constitution make it clear that neither the 1992 advisory opinion nor the *post hoc* Law No. 157 enacted in 1993 could be applied to make respondents liable for moral damages arising out of a 1989 accident.[10]

If petitioners were correct that the act of state doctrine is somehow implicated here, then every case involving the interpretation and application of foreign law under Federal Rule of Civil Procedure 44.1 would present an act of state issue. The party on the losing side of a foreign law argument inevitably would contend that the court violated the act of state doctrine by rejecting the losers' view as to which aspect of foreign law should control the controversy. As this Court stated with respect to the Full Faith and Credit Clause:

> If every time the courts of a state put a construction upon the statutes of another state, this Court may be required to determine whether that construction was or was not correct, upon the ground that if it was concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated.

Glenn v. Garth, 147 U.S. 360, 368-69 (1893).

[10] In addition, nothing in Law No. 157 provides for its retroactive application. *See* App. 16a-17a.

D. No Special and Important Reasons Exist for Granting the Writ

Assuming, *arguendo*, that petitioners had asserted federal claims in a timely manner and that the Third District Court of Appeal's opinion somehow implicated the Due Process Clause or the act of state doctrine, the Court nevertheless should deny the Petition because the decision below simply does not present any federal questions of importance.[11]

The enactment of Law No. 157 by the Nicaraguan National Assembly demonstrates that review by this Court would be a waste of judicial resources. Because the National Assembly has now changed Nicaraguan law concerning moral damages, the decision of the Third District Court of Appeal is of limited precedential value. It will affect only these cases and no future cases filed in Florida or elsewhere to which Nicaraguan law might apply. The Third District Court of Appeal's decision, therefore, is limited to its facts and no special and important reasons exist to grant certiorari. *See* Sup. Ct. R. 10.1.

More simply, the issue in these cases is the application of foreign law to state claims, as determined by a state court. The ruling on Nicaraguan damage law is not a question of federal law, and it is certainly not "an important question of federal law which should be decided by the Court." Sup. Ct. R. 10.1.

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[11] Counsel for the "Republic of Nicaragua" has filed an *amicus curiae* brief in support of the petition for writ of certiorari. The *amicus* brief appears to have been authorized by the Ministry of Foreign Relations of Nicaragua, *see* Pet. A - 60, but the present Attorney General of Nicaragua apparently has not authorized the filing of an *amicus* brief in this Court. *See* App. 5a-9a.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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